

GOVERNMENT PROPOSED JURY INST. NO. 92Tax Evasion -- Offense Charged

The indictment sets forth _____ counts or charges.

Count I charges that the defendant, _____, who during the calendar year 19__ was married and resided at _____ in the District of _____, willfully attempted to evade and defeat a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year _____, by causing to be filed with the Director, Internal Revenue Service Center, at _____, _____, on or about _____, 19__, a false and fraudulent income tax return on behalf of himself and his wife, wherein it was stated that their joint taxable income for said calendar year was the sum of \$_____, and that the amount of tax due and owing thereon was the sum of \$_____; whereas, as the defendant then and there well knew, their joint taxable income for the said calendar year was the sum of \$_____ upon which said taxable income there was owing to the United States of America an income tax of \$_____.

Count II charges that * * *

All in violation of Title 26, United States Code, Section 7201.

Devitt, Blackmar and O'Malley, **Federal Jury Practice and Instructions** (4th Ed. 1990), Section 56.01 (modified)

GOVERNMENT PROPOSED JURY INST. NO. 93

Statute Defining Offense

Section 7201 of the Internal Revenue Code provides, in part, that:

Any person who willfully attempts in any manner to evade or
defeat any tax imposed by this title * * * shall * * * be guilty (of an
offense against the laws of the United States)

26 U.S.C. § 7201

Devitt, Blackmar and O'Malley, *Federal Jury Practice and Instructions* (4th Ed. 1990), Section
56.02

GOVERNMENT PROPOSED JURY INST. NO. 94

Elements Of Attempt
To Evade Or Defeat A Tax

To establish the offense of attempting to evade and defeat a tax, the government is required to prove beyond a reasonable doubt the following three elements:

First, a substantial income tax was due and owing from the defendant in addition to that declared in his [her] income tax return;

Second, an affirmative attempt, in any manner, to evade or defeat an income tax, and

Third, the defendant willfully attempted to evade and defeat the tax.

The burden is always upon the prosecution to prove beyond a reasonable doubt every essential element of the crime charged; the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

26 U.S.C. § 7201

Spies v. United States, 317 U.S. 492 (1943)

Lawn v. United States, 355 U.S. 339, 361 (1958)

Sansone v. United States, 380 U.S. 343, 351 (1965)

United States v. Pomponio, 429 U.S. 10, 12 (1976)

Cheek v. United States, 498 U.S. 192, 195 (1991)

GOVERNMENT PROPOSED JURY INST. NO. 95

Essential Elements of Offense

In order to sustain its burden of proof for the crime of willfully attempting to evade and defeat a tax as charged in Count __ of the indictment, the government must prove the following three (3) essential elements beyond a reasonable doubt:

One: A substantial income tax was due from the defendant [*in addition to that declared in the defendant's income tax return*][*in addition to that paid by the defendant*];

Two: The defendant attempted to evade or defeat this [*additional*] tax as described in the indictment; and

Three: In attempting to evade or defeat such [*additional*] tax, the defendant _____ acted willfully.

GOVERNMENT PROPOSED JURY INST. NO. 96Tax Evasion
(26 U.S.C. § 7201)

Title 26, United States Code, Section 7201, makes it a crime for anyone to willfully attempt to evade or defeat the payment of federal income tax. "Willfully" means with intent to violate a known legal duty.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant owed substantially more tax than he reported on his 19_ income tax return because he [*e.g. failed to report income*];

Second: That when the defendant filed that income tax return he knew that he owed substantially more taxes to the government than he reported on that return; and

Third: That when the defendant filed his 19_ income tax return, he did so with the purpose of evading payment of taxes to the government.

The proof need not show the precise amount or all of the additional tax due as alleged in the indictment, but it must be established beyond a reasonable doubt that the accused knowingly attempted to evade or defeat some substantial portion of such additional tax.

Pattern Jury Instructions, Criminal Cases, Fifth Circuit (1990 Ed.), Substantive Offense Instructions, § 2.88, p. 201

GOVERNMENT PROPOSED JURY INST. NO. 97

Income Tax Evasion
(26 U.S.C. § 7201)

The defendant is charged in [*Count _ of*] the indictment with income tax evasion in violation of Section 7201 of Title 26 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First: The defendant owed more federal income tax for the calendar year 19_ than was declared due on the defendant's income tax return;

Second: the defendant knew that more federal income tax than was declared due on the defendant's income tax return; and

Third: The defendant [*insert what the defendant did as indicated by the evidence*] with the intention of defrauding the government of taxes owed.

GOVERNMENT PROPOSED JURY INST. NO. 98

Tax Evasion (General Charge)
(26 U.S.C. § 7201)

Section 7201 of the Internal Revenue Code (26 U.S.C. § 7201) makes it a Federal crime or offense for anyone to willfully attempt to evade or defeat the payment of federal income taxes.

The defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the defendant owed substantial income tax in addition to that declared in his tax return; and

Second: That the defendant knowingly and willfully attempted to evade or defeat such tax.

The proof need not show the precise amount of the additional tax due as alleged in the indictment, but it must be established beyond a reasonable doubt that the defendant knowingly and willfully attempted to evade or defeat some substantial portion of such additional tax as charged.

The word "attempt" contemplates that the defendant had knowledge and an understanding that, during the particular tax year involved, he had income which was taxable, and which he was required by law to report; but that he nevertheless attempted to evade or defeat the tax, or a substantial portion of the tax on that income, by willfully failing to report all of the income which he knew he had during that year.

Federal income taxes are levied upon income derived from compensation for personal services of every kind and in whatever form paid, whether as wages, commissions, or money earned for performing services. The tax is also levied upon profits earned from any business,

regardless of its nature, and from interest, dividends, rents and the like. The income tax also applies to any gain derived from the sale of a capital asset. In short, the term "gross income" means all income from whatever source unless it is specifically excluded by law.

On the other hand, the law does provide that funds acquired from certain sources are not subject to the income tax. The most common nontaxable sources are loans, gifts, inheritances, the proceeds of insurance policies, and funds derived from the sale of an asset to the extent those funds equal the cost of the asset.

Pattern Jury Instructions, Criminal Cases, Eleventh Circuit (1985 Ed.), Offense Instructions, Instruction No. 69.1, p. 229

GOVERNMENT PROPOSED JURY INST. NO. 100Tax Deficiency

One element of attempted tax evasion is a substantial tax deficiency or, in other words, a substantial amount of Federal income tax due and owing by the defendant over and above the amount of tax reported in the defendant's return(s). Each year must be considered separately. In other words, the defendant's tax obligation in any one year must be determined separately from his tax obligations in any other year.

The defendant is charged with failing to pay a specific amount of tax due for each of the calendar years alleged in the indictment. The proof need not show, however, the precise amount or all of the additional tax due as alleged. The government is only required to establish, beyond a reasonable doubt, that the defendant attempted to evade a substantial income tax, **1** whether greater or less than the income tax charged as due in the indictment.

Pattern Jury Instructions, Criminal Cases, Fifth Circuit (1990 Ed.), Substantive Offense Instructions, Instruction No. 2.88, p. 201 (modified)

Devitt, Blackmar and O'Malley, *Federal Jury Practice and Instructions* (4th Ed. 1990), Sections 56.08 and 56.23 (modified)

Pattern Jury Instructions, Criminal Cases, Eleventh Circuit (1985 Ed.), Offense Instructions, Instruction No. 69.1 (portion)

United States v. Johnson, 319 U.S. 503, 517-518 (1943)

NOTE

1The tax deficiency need not be "substantial" in the Ninth Circuit. *United States v. Marashi*, 913 F.2d 724, 735 (9th Cir. 1990); *Manual of Model Jury Instructions for the Ninth Circuit* (1990 Ed.), Section 9.06A Comment

GOVERNMENT PROPOSED JURY INST. NO. 101

Each Tax Year is Separate

Any willful failure to comply with the requirements of the Internal Revenue Code for one year is a separate matter from any such failure to comply for a different year. The tax obligations of the defendant in any one year must be determined separately from the tax obligations in any other year.

Devitt, Blackmar and O'Malley, *Federal Jury Practice and Instructions* (4th Ed. 1990), Section 56.24.

GOVERNMENT PROPOSED JURY INST. NO. 102To "Attempt to Evade or Defeat" a Tax -- Explained

The phrase "attempts in any manner to evade or defeat any tax" involves two things: first, the formation of an intent to evade or defeat a tax; and second, willfully performing some act to accomplish the intent to evade or defeat that tax.

The phrase "attempts in any manner to evade or defeat any tax" contemplates and charges that the defendant _____ knew and understood that during the calendar year 19__, he [she] owed [*a substantial federal income tax*] [*substantially more federal income tax than was declared on the defendant's federal income tax for that year*][*substantially more federal income tax than had been paid for that year*] and then tried in some way to avoid that [*additional*] tax.

In order to show an "attempt[s] in any manner to evade or defeat any tax", therefore, the government must prove beyond a reasonable doubt that defendant _____ intended to evade or defeat the tax due, and that the defendant _____ also willfully did some affirmative act in order to accomplish this intent to evade or defeat that tax.

Devitt, Blackmar and O'Malley, *Federal Jury Practice and Instructions* (4th Ed. 1990), Section 56.04

Manual of Model Criminal Jury Instructions, Eighth Circuit (1992 Ed.), Section 6.26.7201 (portion)

Spies v. United States, 317 U.S. 492, 500 (1943)

Sansone v. United States, 380 U.S. 343 (1965)

GOVERNMENT PROPOSED JURY INST. NO. 103Willfulness

To find the defendant guilty of violating Section 7201, you must not only find that he [she] did the acts of which he [she] stands charged, but you must also find that the acts were done willfully by him [her].

The word "willfully," as used in this statute, means a voluntary, intentional violation of a known legal duty. In other words, the defendant must have acted voluntarily and intentionally and with the specific intent to do something he [she] knew the law prohibited, that is to say, with intent either to disobey or to disregard the law.

In determining the issue of willfulness, you are entitled to consider anything done or omitted to be done by the defendant and all facts and circumstances in evidence that may aid in the determination of his [her] state of mind. It is obviously impossible to ascertain or prove directly the operations of the defendant's mind; but a careful and intelligent consideration of the facts and circumstances shown by the evidence in any case may enable one to infer what another's intentions were in doing or not doing things. With the knowledge of definite acts, we may draw definite logical conclusions.

We are, in our daily affairs, continuously called upon to decide from the acts of others what their intentions or purposes are, and experience has taught us that frequently actions speak more clearly than spoken or written words. To this extent, you must rely in part on circumstantial evidence in determining the guilt or innocence of the defendant.

In this regard, there are certain matters that you may consider as pointing to willfulness, if you find such matters to exist in this case. By way of illustration only, willfulness may be inferred from conduct such as *[set forth examples appropriate under the evidence, e.g.,*

making false entries or alteration, or false invoices or documents, concealment of assets or covering up sources of income, handling one's affairs to avoid making the records usual in transactions of the kind] and any conduct the likely effect of which would be to mislead or to conceal.

I give you these instances simply to illustrate the type of conduct you may consider in determining the issue of willfulness. I do not by this instruction mean to imply that the defendant did engage in any such conduct. It is for you as the trier of the facts to make this determination as to whether the defendant did or did not.

Devitt and Blackmar, *Federal Jury Practice and Instructions* (4th Ed. 1992), Section 17.07 (modified and supplemented)

Devitt and Blackmar, *Federal Jury Practice and Instructions* (4th Ed. 1990), Section 56.20 (modified)

Pattern Jury Instructions, Fifth Circuit (1990 Ed.), Section 2.88 (Note)

Federal Criminal Jury Instructions of the Seventh Circuit (1980 Ed.), Section 6.03 (modified)

Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit (1992 Ed.), Section 7.02 (Comment)

Manual of Model Jury Instructions for the Ninth Circuit (1992 Ed.), Section 5.05 (Comment)

Pattern Jury Instructions, Criminal Cases, Eleventh Circuit (1985 Ed.), Basic Instructions, Instruction No. 9.1, p. 22 (modified)

Cheek v. United States, 498 U.S. 192, 201 (1991)

United States v. Pomponio, 429 U.S. 10, 12 (1976)

United States v. Bishop, 412 U.S. 346, 360 (1973)

Spies v. United States, 317 U.S. 492, 499 (1943)

United States v. Ashfield, 735 F.2d 101, 105 (3d Cir.), *cert. denied sub nom.*, *Storm v. United States*, 469 U.S. 858 (1984)

United States v. Conforte, 624 F.2d 869, 875 (9th Cir.), *cert. denied*, 449 U.S. 1012 (1980)

United States v. Ramsdell, 450 F.2d 130, 133-134 (10th Cir. 1971)

United States v. Spinelli, 443 F.2d 2, 3 (9th Cir. 1971)

COMMENTS

1 It is not necessary to define the term "willfully" in a tax case in terms of "bad purpose" or "evil motive." *United States v. Pomponio*, 429 U.S. 10, 12 (1976). *See also* Section 8.06[1], *supra*.

2 Willfulness has the same meaning in the felony and misdemeanor sections of the Internal Revenue Code. *United States v. Pomponio*, 429 U.S. 10, 12 (1976).

3 For examples of conduct from which willfulness may be inferred, *see* Section 8.06[3], *supra*.

GOVERNMENT PROPOSED JURY INST. NO. 106

"Willfully" -- To Act or to Omit

An act or failure to act is "willful" if it is a voluntary and intentional violation of a known legal duty.

Accidental, inadvertent, mistaken, or negligent, even grossly negligent, conduct does not constitute willful conduct.

Devitt and Blackmar, *Federal Jury Practice and Instructions* (4th Ed. 1990), Section 56.20 (modified).

COMMENTS

1 It is not necessary to define the term "willfully" in a tax case in terms of "bad purpose" or "evil motive". *United States v. Pomponio*, 429 U.S. 10, 12 (1976).

2 Willfulness has the same meaning in the felony and misdemeanor sections of the Internal Revenue Code. *United States v. Pomponio*, 429 U.S. 10, 12 (1976).

3 For examples of conduct from which willfulness may be inferred, *see* Section 8.06[3], *supra*.

GOVERNMENT PROPOSED JURY INST. NO. 107Knowledge of Falsehood
(Deliberate Ignorance)

The fact of knowledge may be established by direct or circumstantial evidence, just as any other fact in the case.

The element of knowledge may be satisfied by inferences drawn from proof beyond a reasonable doubt that the defendant deliberately closed his [her] eyes to what would otherwise have been obvious to him [her].

A finding beyond a reasonable doubt of a conscious purpose to avoid enlightenment would permit an inference of knowledge. Stated another way, a defendant's knowledge of a fact may be inferred from proof beyond a reasonable doubt of his [her] deliberate blindness to the existence of the fact.

It is entirely up to you to as to whether you find any deliberate closing of the eyes, and the inferences to be drawn from any such evidence. Although knowledge may be inferred from the defendant's behavior, the issue is what the defendant actually knew. A showing of mistake, carelessness, negligence, even gross negligence or recklessness, is not sufficient to support a finding of wilfulness or knowledge.

See *United States v. MacKenzie*, 777 F.2d 811, 818 n.2 (2d Cir. 1985), *cert. denied*, 476 U.S. 1169 (1976)

COMMENTS

1 The law on "deliberate ignorance" or "willful blindness" varies from circuit to circuit. Several circuits have indicated that "deliberate ignorance" instructions are rarely appropriate. See, e.g., *United States v. Mapelli*, 971 F.2d 284, 286 (9th Cir. 1992); *United States v. Ojebode*, 957 F.2d 1218, 1229 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 1291 (1993); *United States v. deFranciso-Lopez*, 939 F.2d 1405, 1409 (10th Cir. 1991). Furthermore, several recent

cases have found "deliberate ignorance" instructions to constitute reversible error when the evidence did not support the giving of the instruction. *See, e.g., United States v. Mapelli*, 971 F.2d at 287; *United States v. Barnhart*, 979 F.2d 647, 652-53 (8th Cir. 1992). *But see United States v. Stone*, 9 F.3d 934 (11th Cir. 1993).

As a result, great care should be exercised in the use of such an instruction. The law of the circuit should be carefully checked and no such instruction should be requested unless the evidence clearly supports it.

2 If the evidence does clearly support a "deliberate ignorance" instruction and a decision is made to request one, care still must be taken regarding its wording. In particular, no instruction should be requested in a criminal tax case which is inconsistent with the standard of willfulness set forth in *Cheek v. United States*, 498 U.S. 192, 201 (1991), that is, a voluntary, intentional violation of a known legal duty.

3 Unlike the instruction set forth above, which requires actual knowledge, the "deliberate ignorance" instruction in *United States v. Fingado*, 934 F.2d 1163, 1166 (10th Cir.), *cert. denied*, 112 S. Ct. 320 (1991), provides that the element of knowledge is established if the defendant is "aware of a high probability of the existence of the fact in question unless he actually believes it does not exist." Although we believe that, in the context of a defendant's deliberate ignorance, this standard does satisfy the knowledge component of willfulness in criminal tax cases, we do not recommend its use (although, obviously, such an instruction may be used in the Tenth Circuit) because there is at least some risk that a court of appeals will hold that only a defendant's actual knowledge is sufficient.

GOVERNMENT PROPOSED JURY INST. NO. 109

When the Offense May Be Complete

If you find beyond a reasonable doubt from the evidence in the case that [*a fraudulent return was filed*][*the defendant failed to file a return*] and that this was done willfully as charged in Count _ of the indictment [*information*], then you may find that the offense charged was complete [*when the fraudulent return was filed*][*on the date the return was due.*]

Devitt, Blackmar and O'Malley, *Federal Jury Practice and Instructions* (4th Ed. 1990), Section 56.23

COMMENTS

1 It is not necessary to define the term "willfully" in a tax case in terms of "bad purpose" or "evil motive." *United States v. Pomponio*, 429 U.S. 10, 12 (1976).

2 Willfulness has the same meaning in the felony and misdemeanor sections of the Internal Revenue Code. *United States v. Pomponio*, 429 U.S. 10, 12 (1976).

3 See also instructions on willfulness set forth as part of the instructions on 26 U.S.C. § 7201, *supra*.